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No. 88-1863

In the Supreme Court of the United States

OCTOBER TERM, 1988

CRISTOBAL G. CUELLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause or the Due Process Clause of the Fifth Amendment prohibits the admission in a federal criminal prosecution of evidence regarding a prior criminal offense of which the defendant had been acquitted in state court.

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OPINIONS BELOW

The amended opinion of the Court of Military Appeals (Pet. App. 1a-17a) is reported at 27 M.J. 50. The original opinion of the Court of Military Appeals (Pet. App. 18a-30a) is reported at 24 M.J. 55. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 31a-43a) is reported at 22 M.J. 529.

JURISDICTION

The Court of Military Appeals entered its judgment on September 28, 1988, and amended the judgment on March 28, 1989. The petition for a writ of certiorari was filed on May 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a general court-martial, petitioner, a member of the United States Navy, was convicted on one specification of committing an indecent act upon a female under 16 years of age, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. The court-martial sentenced petitioner to confinement for six years, a dishonorable discharge, and a reduction to pay grade E-1. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. Pet. App. 31a-43a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a-17a.

1. Petitioner held a family gathering at his quarters on Thanksgiving Day 1983. The guests included petitioner's wife's sister, her husband, and their four children, among them 10-year-old Jenny Hermosillo. Tr. 66. The guests spent the night at petitioner's house. Jenny slept in a king-sized bed with petitioner's young son and daughter. Tr. 69, 71. When she went to sleep, Jenny was fully dressed, except for her shoes and socks. Tr. 71. During the night, she awoke to find her shirt pulled up to the middle of her chest, her pants unbuttoned and unzipped, and petitioner rubbing her bare stomach. Tr. 71-72.

Jenny immediately pushed petitioner's hand away and tried to get up. Tr. 72. Petitioner forced her back down onto the bed and told her to "just lay down and I'll leave

you alone." *Ibid.* Jenny complied, but petitioner then proceeded to lift her panties away from her body and put his hand close to her vagina. Tr. 73, 85-86. Jenny then hit petitioner's arm, and petitioner stopped. Tr. 73. In an effort to escape petitioner, Jenny told petitioner she had go to the bathroom. Tr. 74. Petitioner responded by saying, "Go, but come right back, and if you go and tell anybody, you're going to be in big trouble." *Ibid.* Despite petitioner's threat, Jenny went to her parents and told her father what had happened. Tr. 75.

Jenny was shaking and crying as she described what petitioner had done to her. Tr. 90. Jenny's father immediately confronted petitioner, who was waiting for him in the living room. Tr. 90, 95. When he accused petitioner of molesting his daughter, petitioner did not deny the charge, but simply motioned to him to be quiet. Tr. 90. The Hermosillo family then packed and left petitioner's house at approximately 4 a.m. Tr. 90.[1]

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[1] Besides the obvious fact that the victim would recognize her own uncle, an additional reason why Jenny was certain that her uncle was the person who molested her was that petitioner was the only bald person in the house that night. Tr. 72.

Two other facts in evidence directly implicated petitioner. First, when Jenny returned to her bedroom to get her shoes and socks to leave the house, she noticed a pair of black pants lying on the side of her bed. Tr. 85. Petitioner had worn black pants during the evening, but when Jenny's father confronted him, petitioner was wearing only a pair of cut-off shorts. Tr. 90-91. Second, while talking to a different brother-in-law a month later about the possibility that Jenny's parents would press charges, petitioner said, "I guess I really screwed up this time." Tr. 101. Petitioner then told the brother-in-law to ask Jenny's parents if they would drop the charge if petitioner sought psychiatric help. Tr. 102.

2. Before trial, the prosecutor filed a motion in limine seeking to introduce the testimony of four other young girls, each of whom would testify that petitioner had molested her in his home. Defense counsel argued that the testimony of two of the witnesses should be excluded on the ground that petitioner had been tried and acquitted of the acts about which they would testify. Tr. 17. The trial judge denied the defense motion, Tr. 20, and the four girls testified at trial. The testimony of each one was remarkably similar to Jenny's testimony. See Pet. App. 8a-9a (describing their testimony).

ARGUMENT

Petitioner claims that the trial court erred by allowing two of the four girls to testify that petitioner had committed acts similar to those charged against him in this case. Petitioner argues that, because he was tried and acquitted in state court for charges stemming from those acts, the testimony of those two girls was inadmissible under collateral estoppel principles, as applied under the Double Jeopardy or Due Process Clause of the Fifth Amendment. That claim does not warrant further review.

1. The Court of Military Appeals correctly rejected petitioner's claim. The collateral estoppel doctrine provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*, 440 U.S. 147, 153 (1979). By its terms, that doctrine does not apply to a litigant who was not a party to the prior adjudication. That is true in this case, because the two prior criminal prosecutions were brought by Virginia and California, not by the federal government. Pet. App. 7a; AX 1. Collateral estoppel principles therefore

did not require the exclusion of the prior act evidence in this case.

Ashe v. *Swenson*, 397 U.S. 436 (1970), is not to the contrary. That case, which held that the Double Jeopardy Clause incorporates the collateral estoppel doctrine, involved successive prosecutions by the same State. That fact was critical to the Court's holding that collateral estoppel principles applied in that case, because the Court had previously made clear, and has since reiterated the point, that the Double Jeopardy Clause does not prohibit different sovereigns from prosecuting a defendant for the same acts. *Heath* v. *Alabama*, 474 U.S. 82 (1985); *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Moore* v. *Illinois*, 55 U.S. (14 How.) 13 (1852). Thus, even under the collateral estoppel principles that are incorporated within the Double Jeopardy Clause, petitioner is not entitled to relief. Because the United States did not prosecute petitioner for the acts that were involved in the earlier state court prosecutions, the Double Jeopardy Clause as interpreted in *Ashe* did not require that the prior acts be excluded, even though petitioner was acquitted in those cases.

2. There is no conflict among the circuits on the question presented in the petition. All of the cases petitioner cites applying collateral principles involved successive prosecutions by the same sovereign. *Albert* v. *Montgomery*, 732 F.2d 865 (11th Cir. 1984) (both prosecutions by Georgia); *United States* v. *Johnson*, 697 F.2d 735 (6th Cir. 1983) (both prosecutions by the United States); *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980) (both prosecutions by the United States); *United States* v. *Van Cleave*, 599 F.2d 954 (10th Cir. 1979) (both prosecutions by the United States); *United States* v. *Mespoulede*, 597 F.2d 329 (2d Cir. 1979) (both prosecutions by the United States); *United*

States v. *Day*, 591 F.2d 861 (D.C. Cir. 1978) (both prosecutions by the United States); *United States* v. *Rocha*, 553 F.2d 615 (9th Cir. 1977) (both prosecutions by the United States); *Wingate* v. *Wainwright*, 464 F.2d 209 (5th Cir. 1972) (both prosecutions by Florida). Petitioner has cited no federal court decision, and we are aware of none, holding that collateral estoppel principles apply where a different sovereign brings the second prosecution.[2]

There is no need to hold this case pending the Court's decision in *Dowling* v. *United States*, cert. granted, No. 88-6025 (Feb. 27, 1989). That case involves the question whether the Double Jeopardy or Due Process Clause prohibits the admission in a federal criminal prosecution of evidence regarding a criminal offense of which the defendant had already been acquitted in a prior federal prosecution. Unlike *Dowling*, this case involves prosecutions by different sovereigns. The Court's decision in *Dowling* therefore will not affect the disposition of this case.

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[2] The state rules petitioner cites have no bearing on this case. A few States bar prosecutions of offenses in their own courts when the federal government has already prosecuted the defendant for the same offense. Annot., 6 A.L.R.4th 802 (1981). Most States that do so, however, base that rule on a state statute, not on collateral estoppel principles. *Ibid.* In any event, those rules deal simply with a ban on further prosecution for the same offense, and not with a complete exclusion of all evidence related to the prior prosecution, which is the rule that petitioner seeks.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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